STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 24, 2008
v	No. 281487 Wayne Circuit Court
KEITH BROOKS, Defendant-Appellee.	LC No. 07-006594-01

Before: Owens, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

The prosecution appeals by leave granted Wayne Circuit Judge Deborah A. Thomas' order granting defendant Keith Brooks' motion for a new trial. The prosecution argues that the trial court abused its discretion in granting defendant's motion based on juror misconduct, prosecutorial misconduct, and a finding that the jury's verdict was against the great weight of the evidence. We agree.

Defendant's conviction arises from the allegation that he sexually abused the victim, his niece, in 2004, when she was 15 years old. The victim testified at trial that she went to defendant's house after a family barbeque during Labor Day weekend in 2004 to spend the night with her cousins. She went into a cousin's bedroom alone to talk on her cellular telephone and fell asleep lying on her stomach on the floor. She awoke when defendant entered the room, closed the door most of the way, pulled down her pants and underpants, and began "rubbing the inner lips" of her vagina with his finger. The victim then heard someone get up to use the bathroom, and defendant pulled up the victim's pants and left the room for approximately two minutes. When he returned, he again pulled down her pants and began rubbing his penis against her vagina "in a back and forth motion" for about five minutes. She testified that his penis did not enter her vagina. A jury convicted defendant of first-degree criminal sexual conduct (digital penetration), MCL 750.520b(1)(*ii*) (sexual penetration of a person at least 13 but less than 16 years of age; defendant related to victim by blood or affinity to the fourth degree). He was acquitted of a second count of first-degree criminal sexual conduct (penile penetration). Before sentencing, defendant moved for a new trial on the basis of juror misconduct, prosecutorial misconduct, and great weight of the evidence, and the trial court granted the motion.

We review a trial court's decision to grant a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome;

rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*.

Juror Misconduct

In arguing juror misconduct as a basis for granting a new trial, defendant presented to the trial court an affidavit from Brooks Maudlin, the jury foreman, in which Maudlin claimed that some of the jurors had discussed the case during the trial. He also stated in the affidavit that Juror #1 had twice suggested that Maudlin's position that defendant was not guilty was a "brotherhood thing." According to Maudlin, Juror #1 said this once in front of Juror #14, who "immediately introduced race into the discussion." Maudlin "felt that [Juror #14] was attacking me personally based upon the fact that both Mr. Brooks and I are Black and I was arguing on his behalf." Maudlin claimed that once he was the last juror voting "not guilty," several jurors personally attacked him and other jurors complained that they needed to get back to work. Maudlin stated that he changed his vote to "guilty" because he felt he "could not stay in that room much longer without exploding," and later realized that he had done so because of the pressure from other jurors, not because he believed defendant was guilty.

In general, the admission of juror affidavits or testimony to impeach a jury's verdict is not permitted. *People v Fletcher*, 260 Mich App 531, 539; 679 NW2d 127 (2004). Only where there is evidence that the jury's verdict was affected by influences external to the trial proceedings may a court considered juror testimony to impeach a verdict. *Id*. "Any conduct, even if misguided, that is inherent in the deliberative process is not subject to challenge or review." *Id*. at 540. The Michigan Supreme Court set forth the following analysis:

> In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial probability that they could have affected the jury's verdict. . . . If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. [*People v Budzyn*, 456 Mich 77, 88–89; 566 NW2d 229 (1997) (internal citations omitted).]

In *Budzyn*, *supra*, the defendants were two white Detroit police officers convicted of the second-degree murder of an African-American man during the course of their police duties. *Id.* at 81. In appealing their convictions, the defendants claimed that the jury was improperly influenced by the trial court's showing of the film *Malcolm X* to entertain the jury, receipt of partially inaccurate information that the defendants were members of a special police unit with a reputation for brutality toward young African-American males, and exposure to media reports suggesting that a riot might occur if defendants were acquitted. *Id.* at 92–100. The Michigan Supreme Court concluded that these three influences "were extraneous to the trial proceedings and did not result exclusively from juror misconduct inherent in the verdict." *Id*. at 92.

By contrast, in *Fletcher*, *supra*, this Court concluded that the jury's reenactment of the shooting of the victim did not constitute an extraneous influence. It reasoned that, unlike in

Budzyn, "the jurors here based their deliberations exclusively on the testimony elicited during the trial. . . . The reenactment was closely intertwined with the deliberative process and was not premised on anything other than the jurors' collective account of the evidence presented in open court." *Id*. at 542. This Court also distinguished *Doan v Brigano*, 237 F3d 722 (CA 6, 2001), overruled on other grounds *Wiggins v Smith*, 539 US 510; 123 S Ct 2527; 156 L Ed 2d 471 (2003), in which the defendant, who had been convicted of murdering his girlfriend's fifteen-month-old child, claimed that he had not observed bruises on the child's body while giving her a bath on the night she died because the bathroom was too dark. *Fletcher*, *supra* at 542. One of the jurors had tested this claim by painting "bruises" on herself with lipstick to see of they were visible in the dark, and later reported to the other jurors that they were. *Doan*, *supra* at 726–727. The Sixth Circuit Court of Appeals concluded that this constituted an improper extraneous influence. *Id*. at 733. In distinguishing *Doan*, the *Fletcher* court noted the Sixth Circuit's finding that the juror in that case had conducted the lipstick experiment on her own and had, in effect, "testified" as an "expert witness" about her findings. *Fletcher*, *supra* at 543; *Doan*, *supra* at 733. In *Fletcher*, by contrast, "no juror conducted any type of reenactment . . . outside the presence of the other jurors." *Fletcher*, *supra* at 543.

In addition, there is extensive federal case law concerning the distinction between internal and external jury influences to which Michigan courts have sometimes looked in considering jury misconduct cases.[1] See, e.g., *Budzyn*, *supra* at 88–92, 100; *Fletcher*, *supra* at 542. "[P]otentially premature deliberations that occurred during the course of the trial" have been held to constitute internal influences, as have verdicts achieved through compromise, juror misgivings about the verdict, juror agreement on a time limit for the verdict, *United States v Logan*, 250 F3d 350, 380–381 (CA 6, 2001), and whether a juror was pressured into arriving at a particular conclusion, *Doan*, *supra* at 733.

In this case, defendant alleged four instances of juror misconduct in his motion for a new trial: (1) some of the jurors discussed the case before they were instructed to begin deliberations; (2) rather than focusing on the evidence, several jurors made their need to return to their jobs the primary argument against the jurors who maintained that defendant should be found not guilty; (3) race was improperly injected into the jury's discussions; and (4) one juror relied on her experience with young women who had been the victims of sexual abuse "as purportedly giving her some extraordinary ability" to evaluate the victim's credibility, and apparently told the other jurors that she had this ability.

However, there is no indication that any "extraneous influence" was introduced to the jury or influenced its verdict. Although it was improper for the jurors to discuss the case before the trial court instructed it to so and to allow their need to return to work to motivate their deliberations, these are the sorts of "internal influences" contemplated by the case law. See, e.g., *Doan*, *supra* at 733; *Logan*, *supra* at 380–381. The allegation that race entered into the jury's discussions, and the attendant implication that racial bias motivated the verdict, while much more disturbing, is still not an "extraneous influence." The juries in *Budzyn*, *supra*, and *Doan*, *supra*, were exposed to outside information or evidence. In *Budzyn*, the jury received

[1] Unlike Michigan law, federal law codifies this distinction in the court rule. FRE 606(b).

information about the abusive reputation of a Detroit police unit, was told that the defendants had been a part of this unit, and was informed that officials were preparing for the possibility of riots if the defendants were acquitted. *Budzyn*, *supra* at 98–100. In *Doan*, the jury did not receive information about the results of one juror's experiment either in the courtroom or in the jury room. *Doan*, *supra* at 733. Here, by contrast, jurors were exposed only to the thoughts and biases of the other jurors. See also *United States v Casamayor*, 837 F2d 1509, 1515 (CA 11, 1988) ("[T]he alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b) of the Federal Rules of Evidence.").

Similarly, with respect to Maudlin's allegation that Juror #1 told the other jurors that as a basketball coach, "she worked with young girls who had been the victims of sexual assault and she knew when a young girl was telling the truth about such things," there is no indication that under the case law this should be considered an extraneous influence. Moreover, jurors may rely on their general knowledge, common sense, and everyday experience in evaluating the credibility of witnesses. *People v Schmidt*, 196 Mich App 104, 107–108; 429 NW2d 509 (1992). See also *Hard v Burlington Northern R*, 812 F2d 482, 486 (CA 9,1987) ("Jurors must rely on their past personal experiences when hearing a trial and deliberating on a verdict."); *Grotemeyer v Hickman*, 393 F3d 871, 879 (CA 9, 2004) (observing that "[i]t is hard to know who is lying without some understanding, based on past personal experience, of the circumstances of the witnesses" and holding that "a juror's past personal experiences may be an appropriate part of the jury's deliberations"). In any event, there is no indication that the other jurors deferred to Juror #1's assessment of the victim's credibility on the basis of her claimed expertise. Based on the affidavit, it seems that several jurors were primarily concerned with returning to work.

Defendant had the burden to prove that the jury was exposed to extraneous influences, *Budzyn*, *supra* at 88–89, and it was improper for the trial court to grant defendant's motion for a new trial on the basis of juror misconduct without considering whether defendant met this burden. The trial court failed to even articulate the distinction between extrinsic and intrinsic influences in its findings. Instead, it found that the jury's decision

> was not based upon the evidence but upon a process where discussions began before all the evidence was introduced, opinions were drawn before all evidence was introduced, consideration was more compelling to the fact finders as to when they were gonna [sic] get back to their daily lives, than conducting their job that they had here, and that this interfered with the defendant's opportunity to have a trial that included due process and resulted in justice.

Because defendant failed to demonstrate, and the court failed to find, that the jury was exposed to extraneous influences, the trial court abused its discretion in granting a new trial because of juror misconduct.

Prosecutorial Misconduct

In addition, the trial court based its decision to grant a new trial on its finding that the prosecutor had committed misconduct by (1) seeking to introduce testimony regarding a letter without first notifying defense counsel of the existence of the letter; (2) introducing evidence of "a confrontation that was supposed to have occurred" between the victim's mother and

defendant; and (3) eliciting testimony from defendant regarding his employment status. With respect to the evidence of the letter and the confrontation, we disagree that the prosecutor committed misconduct. With respect to defendant's testimony regarding his employment status, we find that even if the prosecutor committed misconduct, there is no indication that defendant was denied a fair and impartial trial.

We review claims of prosecutorial misconduct de novo to determine whether defendant was denied a fair and impartial trial. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). "Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial." *People v Rice* (*On Remand*), 235 Mich App 429, 435; 597 NW2d 843 (1999).

First, defendant alleged that the prosecutor committed misconduct when she attempted to question Donella Gordon, the victim's aunt and defendant's wife, during direct examination regarding whether she had received a letter from the victim. Although the prosecutor claimed at trial that she had learned of the existence of the letter only that morning, and that she did not notify defense counsel about the letter because Donella said that she no longer had the letter, the trial court sustained defense counsel's objection to the prosecutor's questioning. The trial court apparently agreed with defense counsel that it was improper for the prosecutor to elicit testimony about the letter because its existence had not been disclosed to defense counsel. In deciding defendant's motion for a new trial, the trial court found that the prosecution's withholding of information about the letter was "totally improper."

However, absent a specific rule providing otherwise, a prosecutor is not required to disclose evidence to the defense. "[D]iscovery in criminal cases is constrained by the limitations expressly set forth in the reciprocal criminal discovery rule promulgated by our Supreme Court, MCR 6.201." *People v Greenfield* (*On Reconsideration*), 271 Mich App 442, 447; 722 NW2d 254 (2006). "There is no general constitutional right to discovery in a criminal case. Moreover, due process requires only that the prosecution provide a defendant with material exculpatory evidence in its possession." *Id*. at 447 n 4 (internal quotations and citations omitted).

Nothing in MCR 6.201(A), which governs mandatory disclosure, required the prosecutor to inform defense counsel about Donella's mention of the letter.[2] A prosecutor has no obligation under that provision to disclose to the defendant a witness's unwritten, unrecorded statement. *People v Holtzman*, 234 Mich App 166, 178–179; 593 NW2d 617 (1999); *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997). Granted, a prosecutor must disclose known, exculpatory evidence to the defense, MCR 2.601(B)(1); *Greenfield, supra* at 449 n 5, but there was no indication that evidence regarding the existence or content of the letter was exculpatory to defendant. On the contrary, given defense counsel's objection, the evidence likely was

[2] If the physical document existed and the prosecutor had intended to introduce it at trial, MCR 6.201(A)(6) would have required the prosecution to provide to defense counsel, upon request, an opportunity to inspect the document and a copy of the document. However, Donella apparently told the prosecutor that the letter no longer existed.

damaging to defendant. The trial court abused its discretion to the extent that it based its decision to grant a new trial on the prosecutor's failure to disclose evidence of the letter to the defense.

The second instance of purported prosecutorial misconduct on which the trial court based its decision to grant defendant a new trial concerned the prosecutor's attempt to question the victim's mother, Sandra Gordon, about confronting defendant after she learned of the alleged abuse. When the prosecutor asked Sandra regarding the confrontation, defense counsel objected without stating a basis for his objection. After a sidebar discussion, the trial court granted defense counsel's motion to strike Sandra's testimony that she confronted defendant.

In his motion for a new trial, defendant argued that the prosecution's failure to disclose Sandra's anticipated testimony regarding her confrontation with defendant demonstrated the prosecution's intent to "ambush" defendant. In the motion, the trial court found that the prosecutor's conduct with respect to this testimony was "questionable." However, as discussed *supra*, in the absence of a written or recorded statement, the prosecutor had no obligation to disclose anticipated testimony. *Holtzman*, *supra* at 178–179; *Tracey*, *supra* at 324; MCR 6.201. The record does not establish what Sandra's testimony regarding the confrontation would have been, but given defense counsel's challenge to the prosecutor's questioning on the subject, this testimony likely was not exculpatory to defendant, and therefore not subject to mandatory disclosure. MCR 6.201(B)(1).

Finally, the trial court determined that the prosecutor committed misconduct by attempting to use defendant's testimony about his employment status to call his credibility into question. Defendant testified on direct examination that he was employed as a firefighter in 2004. However, on cross-examination, the prosecutor asked defendant, "But you're currently not a fire fighter, are you, Mr. Brooks?" In response, defendant said that the prosecutor's statement was correct. Defense counsel then objected and, after a sidebar discussion, the prosecution continued cross-examination on another subject. During her closing argument, the prosecution again raised the issue of defendant's employment. She stated:

> But actually, ladies and gentlemen, [defendant] did lie to you on the stand because on direct – and this may seem like a small point but it's significant. Once a liar a liar. [Defense counsel] asked, are you a fire fighter and [defendant] said –.

Defense counsel objected and the following exchange took place in front of the jury:

> [*DEFENSE COUNSEL*]: I object, your Honor, I object your Honor. And I would ask that the Court take notice, or give an instruction – I'd like there to be on this record in front of this jury exactly what we discussed at sidebar because this is wholly improper.
>
> Counsel knows good and well what this is all about. And for her to do that is absolutely reprehensible. I'd like it to be disclosed --
>
> [*PROSECUTOR*]: Judge, all I was going to restate was the answer he gave. And I didn't know that wasn't struck. That was not struck from the record the answer he gave.

[*DEFENSE COUNSEL*]: Your Honor, I want it to be clear because I don't want her to mislead this jury in anyway [sic]. That's ridiculous.

THE COURT: The record should reflect that at sidebar both counsel acknowledged that the defendant had not been discharged from his employment with the Detroit Fire Department.[3]

In his motion for a new trial, defendant argued that this attack on his credibility was improper because the prosecutor stated that he had lied, although she knew that he had not, and because her statement was misleading and prejudicial. The trial court found that in light of the sidebar discussion following defense counsel's initial objection, the prosecution's closing argument regarding defendant's employment status constituted prosecutorial misconduct.

To the extent the trial court relied on this instance of prosecutorial misconduct in granting defendant a new trial, it erred in doing so. Even assuming the prosecutor's conduct was improper, the trial court should not have granted a new trial on this basis because there is no indication that defendant was denied a fair and impartial trial. *Thomas*, *supra* at 453. The court stated on the record and before the jury that both parties had acknowledged that defendant had not been discharged from his employment with the Detroit Fire Department, negating the prosecutor's attempt to impeach defendant on this point.

We assume that the jury followed the court's instructions that defendant was innocent until proven guilty, that the lawyers' statements, arguments, and questions to witnesses are not evidence, and that it could not consider stricken testimony. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Because the trial court's findings of prosecutorial misconduct with respect to evidence of the letter and the confrontation lack a legal basis and because there was no indication that the prosecution's mention of defendant's employment during closing argument denied defendant a fair and impartial trial, we find that the trial court abused its discretion in granting defendant a new trial on the basis of prosecutorial misconduct.[4]

Great Weight of the Evidence

Finally, we find that the trial court abused its discretion when it granted defendant a new trial on the ground that the jury's verdict was against the great weight of the evidence. A new trial may be granted on some or all issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). "A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). Determinations of witness credibility are for the trier of fact; only in

[3] Defense counsel stated at the hearing regarding defendant's motion for a new trial that defendant had been suspended from active duty pending the outcome of this case.

[4] Further, although Judge Thomas chastised the prosecutor for ignoring her instructions and for otherwise disregarding her authority, nothing in the record indicates that the prosecutor failed to behave with proper decorum and respect before the court.

exceptional circumstances are issues of witness credibility grounds for granting a new trial. *Id*. A trial court is not permitted to act as a "thirteenth juror" and grant a motion for a new trial based on its disagreement with the jury's assessment of witness credibility. *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). As the Michigan Supreme Court noted in *Lemmon*, federal courts have developed several tests for the application of this narrow exception:

> [1] if the testimony contradicts indisputable physical facts or laws, [2] where testimony is patently incredible or defies physical realities, [3] where a witness's testimony is material and so inherently implausible that it could not be believed by a reasonable juror, or [4] where the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies. [*Id*. at 643–644 (quotations and citations omitted).]

A person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with a person who is at least 13 but less than 16 years of age and is related to the victim by blood or affinity to the fourth degree. MCL 750.520b(1)(b)(*ii*). "Sexual penetration" refers to any intrusion, however slight, "of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(o).

In this case, in addition to its findings regarding juror and prosecutorial misconduct, the trial court based its decision to grant defendant a new trial on its conclusion that the verdict was against the great weight of the evidence, largely as a result of inconsistencies between the victim's testimony at the preliminary examination and at trial. Although the court did not cite any specific inconsistencies, it presumably based its finding on the inconsistencies raised by defendant: (1) whether defendant left the room during the incident, and, if so, how many times; (2) whether either the victim or defendant pulled up the victim's pants when defendant left the room during the incident; (3) which family member got up to use the bathroom during the incident; and (4) whether defendant touched the victim with his finger.

With respect to the first claimed inconsistency, the victim testified during direct examination that defendant entered the room, pulled down her pants, touched her vagina with his finger, and then got up and left the room when her younger cousin got up to use the bathroom. She testified that he returned approximately two minutes later, again pulled her pants down, touched her vagina with his penis for about five minutes, and then left the room. Defense counsel attempted to show that this testimony was inconsistent with the victim's police statement and preliminary examination testimony. During cross-examination, the victim admitted that her police statement "sound[ed] as if [she was] saying that everything happened at once, and once [defendant] left the room he never came back." She also admitted that at the preliminary examination, she first gave a narrative description of the incident, but when she was asked by the prosecutor "item by item" what happened, she only mentioned that defendant touched her with his finger before he left the room the first time after the prosecutor specifically asked for clarification on this point. Therefore, there were arguably some inconsistencies in the victim's statements with respect to whether defendant left the room and whether he touched her before he left the room.

On the basis of the above exchanges, the jury could have concluded that the victim's statements were inconsistent regarding whether defendant left the room during the incident and whether he touched her before he left the room. Yet it would not be unreasonable for the jury to

simply view any differences in her statements as features of the brief nature of a police statement and the form of the questioning at the preliminary examination. This testimony was not "patently incredible" or "so inherently implausible that it could not be believed by a reasonable juror." *Lemmon*, *supra* at 643–644. In any event, even if the jury found that her statements were somewhat inconsistent, the jury was still permitted to believe the victim's allegations of abuse. See *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999) ("[A] jury is free to believe or disbelieve, in whole or in part, any of the evidence presented.").

The second claimed inconsistency involved the victim's testimony regarding whether defendant pulled her pants up before he left the room the first time. On direct examination, she testified that defendant pulled up her pants, but not her underpants, when he left the room. However, on cross-examination, she admitted that she testified at the preliminary examination that neither she nor defendant pulled her pants or underwear back up when defendant initially left the room; they were still down when defendant returned. Therefore, the victim's trial testimony was inconsistent with her testimony at the preliminary examination in this respect, and defense counsel successfully highlighted this inconsistency at trial.

Defendant also identified inconsistencies in the victim's testimony concerning which family member got up to use the bathroom during the incident. On direct examination, the victim testified that after defendant began touching her with his finger, "one of the kids got up. And her room is next to the bathroom. So they were going to the bathroom." Upon further questioning by the prosecutor, the victim said that she heard someone walking into the bathroom but did not know who it was. On cross-examination, the victim admitted that during the preliminary examination, she had identified the person that got up to use the bathroom as her cousin Gabriel, but she did not know if it was Gabriel because she did not actually see anyone enter the bathroom. This testimony was not necessarily inconsistent or lacking in credibility. The victim testified that the bedroom in which she was sleeping was next to the bathroom and that there was another bedroom across the hall. The jury could therefore have reasonably believed that the victim heard someone get up to use the bathroom and assumed it was Gabriel, whose bedroom was apparently across the hall from the bathroom.

Defendant also claimed that in contrast to the victim's testimony at trial, the victim did not testify at the preliminary examination that defendant touched her with his finger until the prosecutor asked her in a "leading and suggestive" manner. The victim admitted at trial that she did not mention at the preliminary examination that defendant touched her with his finger until the prosecutor specifically asked her. The prosecutor then established that once the victim was asked that question at the preliminary examination, she clarified that defendant had touched her with his finger before he initially left the room. The jury was left to determine whether the victim's testimony at the preliminary examination was inconsistent with her testimony at trial because she failed to volunteer the information that defendant touched her with his finger before she was asked and how to weigh this when assessing the victim's credibility.

With each of defendant's four claimed instances of inconsistent testimony, the jurors had the discretion to determine whether they believed that the testimony was inconsistent and how to weigh it in assessing the victim's credibility. Although it would have been plausible for the jury to conclude, based on the above sequences, that the victim was not a credible witness, it was also plausible for the jury to consider these minor discrepancies and to nevertheless find her credible. "[T]he hurdle a judge must clear to overrule a jury is unquestionably among the highest in our

law. It is to be approached by the court with great trepidation and reserve, with all presumptions running against its invocation." *Lemmon*, *supra* at 639, quoting *People v Bart* (*On Remand*), 220 Mich App 1, 12; 558 NW2d 449 (1996). The claimed inconsistencies do not rise to the level required for a trial court to overrule a jury's credibility determination. As the Michigan Supreme Court concluded in *Lemmon*:

> The credibility of a witness is determined by more than words and includes tonal quality, volume, speech patterns, and demeanor, all giving clues to the factfinder regarding whether a witness is telling the truth. The jury was able to see, hear, and observe both the victims and the defendant and determine the credibility of their testimony. The jury found the defendant guilty of all the charges after viewing all the evidence and all the witnesses. The question being one of credibility posed by diametrically opposed versions of the events in question, the trial court was obligated, "despite any misgivings or inclinations to disagree," to leave the test of credibility where statute, case law, common law, and the constitution repose it "in the trier of fact." On the record presented, the jury's evaluation was not inferior to that of the trial court. [*Lemmon*, *supra* at 646–647 (citation omitted).]

The trial court was not permitted to grant a new trial based on mere disagreement with the jury's assessment of witness credibility, *Unger*, *supra* at 11, and there were no "exceptional circumstances" in this case to justify granting a new trial on the grounds of witness credibility, *Lemmon*, *supra* at 642. The victim's testimony did not "contradict physical facts" and was not "patently incredible" or "so inherently implausible that it could not be believed by a reasonable juror," nor was it "seriously impeached" in a "case marked by uncertainties and discrepancies." *Id*. at 643–644. The jury's verdict was not against the great weight of the evidence and the trial court abused its discretion in granting defendant a new trial on this basis.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Peter D. O'Connell
/s/ Alton T. Davis